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Supreme Court, U.S.
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NO. _____

In The
Supreme Court of The United States
October Term 1994

JAY T. TINGLEY, et al.,

Petitioner,

v.

WILLIAMS COUNTY DEPARTMENT OF HUMAN SERVICES,

Respondent.

Petition For A Writ Of Certiorari From The United States Supreme Court of Ohio

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

1. Does a county department of human services deprive foster parents of due process of law when it fails to follow its own published guidelines concerning adoption of children by their foster parents?

2. Are the rights of foster parents created by such published guidelines substantive or procedural in nature?

3. Are damages in such circumstances properly awarded pursuant to 42 U.S.C. section 1983?

LIST OF PARTIES

Jay and Betty Tingley
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Williams County Department of Human Services
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There are no other parties to this action.

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42 U.S.C. section 1983

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Brady v. Town of Colchester, 863 F2d 205, 215-216 (CA2 1988)

Daniels v. Williams, 474 US 327, 337, 88 L Ed2d 662, 674, 106 S Ct 1076 (1986)

Littlefield v. City of Afton, 785 F 2d 596, 607 (CA8 1986)

Matthews v. Eldridge, 424 US 319, 47 L Ed2d 16, 96 S Ct 893 (1976)

Rochin v. California, 342 US 165, 96 L Ed2d 183, 72 S Ct 205 (1952)

Statement of Grounds Invoking this Court's Jurisdiction

This is a timely filed petition for certiorari from the decision of the Supreme Court of Ohio entered May 31, 1995. which declined jurisdiction to hear the case and dismissed petitioner's appeal as not involving any substantial constitutional question. With due respect, petitioners appendix.

This court has jurisdiction to hear this matter because it alleges a violation of 42 U. S. C. section 1983.

STATEMENT OF THE CASE

This is an appeal from a finding of the Supreme Court of Ohio that declined jurisdiction to hear the case and dismissed petitioners appeal as not involving any substantial constitutional question. Two issues were raised on appeal to the Ohio Supreme Court. First, petitioners claimed that defendant below violated their rights to substantive due process, entitling them to damages pursuant to 42 U.S.C. section 1983. Second, petitioners claimed that their suit against defendant below was not barred by Ohio's governmental immunity statute. Both of these claims arose

when the Ohio Court of Appeals reversed a decision of the trial court awarding damages to petitioners. Petitioners seek review of only the 1983 issue in this Court.

Petitoners are foster parents who sought to adopt a child throught Williams County Department of Human Services (DHS). Petitioners are highly skilled foster parents, having been honored twice by DHS as Foster Parents of the Year. In addition, they had previously adopted a child through DHS. The child has been referred to throughout the proceedings below as Brittany. She was a normal, healthy, white infant. She became eligible for

adoption while placed in petitioners' home.

Petitioners made proper and timely application to adopt their foster child. While no one ever made any specific promise that the adoption would be approved, a social worker employed by DHS and handling Brittany's case testified to the effect that she assumed that the adoption would take place.

Shortly after petitioners applied to adopt Brittany, the executive director of DHS advised petitioners that Brittany would be adopted by another family. Brittany was removed

from petitioners home on January 31, 1992. Petitoners commenced litigation shortly thereafter, alleging the torts of negligence, intentional infliction of emotional distress, and denial of their right to substantive due process in violation of 42 U.S.C. section 1983. The 1983 claim states that DHS violated its own published guidelines, which state that foster parents are to be given a preference if seeking to adopt their foster children. It is not contested that petitioners did not receive such a preference.

After the trial court dismissed the case and the dismissal was reversed by the Ohio Court of Appeals (Sixth

Appellate District), the matter was tried. Petitioners were awarded judgment on two of their tort claims, including their claim that they were entitled to damages under 42 U. S. C. section 1983 for denial of due process by DHS. The trial took place on March 9-10, 1994. A jury awarded Tingleys damages in the amount of $2,500.00 on the negligence portion of their claim, and $1,500.00 as damages for the deprivation of substantive due process under Section 1983. DHS appealed the Trial Court's decision.

The Ohio Court of Appeals (Sixth Appellate District) reversed the decision of the trial court and found

that there was no competent, credible evidence was presented that petitioners' right to due process was violated by appellant's decision to place Brittany in another home. As previously indicated, the Ohio Supreme Court declined jurisdiction and dismissed petitioners' appeal on this issue. Both decisions are supplied in the appendix. Petitioners seek review and intervention of this honorable Court.

ARGUMENT

Due process of law is a fundamental right accorded to all citizens of the United States under the Fourteenth Amendment to the Constitution of the Untied States of America. The Supreme Court of the United States has decided hundreds of cases involving the limits of due process. Mr. Justice Stevens, concurring in the case of Daniels v. Williams, (1986) 474 US 327, 337, 88 L Ed 2d 662, 674, 106 S Ct 1076, identifies the following types of protection afforded by the Due Process clause: incorporation of the

guarantees of the Bill of Rights made applicable to the states, guarantee of procedural fairness, and substantive bar against arbitrary government action. Petitioners have been vicitimized by the arbitrary action of a government agency, and thus respectfully direct the Court's attention to the third category of cases identified by Mr. Justice Stevens: those which prohibit arbitrary government action.

First of all, substantive due process prohibits arbitrary, capricious abuses of government power. It protects persons from government conduct so egregious and shocking that it is

impermissible regardless of the procedural safeguards employed. In other words, it "shocks the conscience" and "offends a sense of justice". Rochin v. California, 342 U.S. 165, 96 L Ed 2d 183, 72 S Ct 205 (1952). In the instant case, an Ohio jury found that defendants-appellees placed a child for adoption with a family other than petitioners' in contravention of its own published policy. Petitioners submit that such conduct is so egregious and shocking that it amounts to a denial of their substantive due process rights under Rochin, supra.

Second, and arguing in the alternative, if the Court should find

that the conduct of defendants-appellees does not violate the Rochin standard, petitioners contend that their situation is similar to a series of cases involving land use and zoning laws. For example, Brady v. Town of Colchester, 863 F2d 205, 215-216 (CA 2 1988), holds that substantive due process assures property owners right to be free from arbitrary or irrational zoning actions, such as those motivated by political animus. Littlefield v. City of Afton, 785 F 2d 596, 607 (CA8 1986), holds that placing arbitrary conditions on granting a building permit may violate

unaffected by the existence of state remedies. Finally, Bateson v. Griese, 857 F2d 1300, 1303, (CA9 1988) holds that a city's denial of a building permit to an individual who met all requirements was such an arbitrary discriminatory administration of local regulations as to constitute a violation of petitioners' substantive due process rights.

These cases are similar to the petitioners' situation in the following ways: both involve the discretionary actions of a body of local government; both bodies of local government have published regulations which regulate their conduct; and both bodies of local

government acted contrary to their published policies. Therefore, petitioners submit that the result in their case should be the same as in the cited cases: namely, that this Court should hold the arbitrary actions of the agency violated their rights of substantive due process.

This body of law must be distinguished from the cases dealing with procedural due process allegations. It is the procedural due process cases that set up the two part test which requires a showing of whether a plaintiff has a liberty or property interest, and then whether any rights have been violated. Matthews v.

Eldridge, 424 US 319, 47 L Ed 2d 16, 96 S Ct 893 (1976).

Appellants have contended throughout these proceedings that appellees acted in an arbitrary and capricious manner when it ignored its own published policy concerning adoption by foster parents. The have not asserted that any procedural defect was denied them. They have not asserted any violation of their constitutional right to privacy. They have not asserted any constitutional right to adopt, and they have not asserted that they became a "family" with their foster child, and thereby were entitled to special constitutional

treatment. Their claim is simple: they were entitled to a preference in their efforts to adopt Brittany, they did not get it, and appellees actions in placing Brittany elsewhere deprived them of the substantive right to a preference which did not exist apart from appellees own published policy. Therefore, they were deprived of a substantive due process right, and are entitled to damages under section 1983 for their deprivation.

THE SUPREME COURT OF OHIO

Jay T. Tingley, et al.
Appellants,

v.

Williams County Department of Human Services,
Appellee.

: Case No. 95-496

: ENTRY

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:
Docket Fee, $40.00, paid by Jeffrey Ginther.

(Williams County Court of Appeals; No. 94WM000007)

Thomas J. Moyer
Chief Justice

1995 WL 19112, Jay T. v. Williams County Dept. of Human Services, (Ohio App. 6 Dist. 1995)

NOTICE: RULE 2 OF THE OHIO SUPREME COURT RULES FOR THE REPORTING OF OPINIONS IMPOSES RESTRICTIONS AND LIMITATIONS ON THE USE OF UNPUBLISHED OPINIONS.

Jay T., et al.
v.
WILLIAMS COUNTY DEPARTMENT OF HUMAN SERVICES

No. 94WM000007.
Court of Appeals of Ohio, Williams County.
Jan. 20, 1995.

ABOOD.
**1 This is an appeal from a judgment of the Williams County Court of Common Pleas which, following a jury verdict, found for appellees in the amount of $1500 on their claim of negligence and $2500 on their claim of deprivation of due process pursuant to Section 1983,

Appellant sets forth the following assignments of error:

"I. THE TRIAL COURT ERRED IN DEYNING THE MOTION FOR SUMMARY JUDGMENT FILED BY DEFENDANT AS THERE WERE NO GENUINE ISSUES OF MATERIAL FACT ON WHICH REASONABLE MINDS COULD DIFFER THEREBY ALLOWING THE GRANTING OF SUMMARY JUDGMENT AS A MATTER OF LAW.

"II. THE TRIAL COURT ER RED IN DEYNING THE MOTIONS FOR DIRECTED VERDICT MADE BY DEFENDANT AT TRIAL AS THERE WAS NOT SUFFICIENT EVIDENCE PRODUCED BY PLAINTIFF TO SUSTAIN THE ELEMENTS OF THEIR RESPECTIEV CLAIMS.

"III. THE JURY'S VERDICT ON PLAINTIFF' Sec. 1983 ACTION WAS AGAINST THE MANIFEST WEIGHT OF THE EVIDENCE."

The facts that are relevant to the issues raised on appeal are as follows. On June 17, 1991, the Williams County Department of Human Services (hereafter "appellant") obtained temporary custody of a newborn child (hereafter "Brittany") whom they placed with appellees for foster care. In December 1991, appellees expressed an interest in adopting Brittany but were told that no decision could be made on an adoptive placement until appellant

obtained permanent custody. On January 16, 1992, appellant received permanent custody of Brittany. On January 31, 1992, the child was removed from appellees' home and placed for adoption in Wyandot County.

In February 1992, appellees filed the complaint herein in which they alleged that appellant had wrongfully removed Brittany from their home after they had expressed an interest in adopting her. Appellees sought compensatory damages and an injunction restraining appellant from removing the child. In April 1992, appellees filed an amended complaint which alleged negligence, intentional infliction of emotional distress and the denial of their constitutional rights to due process pursuant to Sction 1983, Title 42, U.S. Code. In March 1992, the trial court denied appellees' claim for injunctive relief. In July 1992, appellant filed a motion to dismiss in which it claimed that the court lacked subject matter jurisdiction. The motion was granted by the trial court in September and in October appellees appealed the ruling to this court. In July 1993, this court affirmed the trial court's dismissal of appellees' complaint as to the prayer for injunctive relief but reversed the

dismissal of the tort claims and prayer for compensatory relief and remanded the case to the trial court for further proceedings on those claims. [See Tingley v. Williams County Department of Human Services (July 23, 1993), Williams County No. 92 WM 000021.]

On December 15, 1993, appellant filed a motion for summary judgment in the trial court. Appellant argued that its functions are defined as governmental under *R.C. 2744.01(C)(1)(m)* and, therefore, pursuant to *R.C. 2744.02(A)(1)*, it is immune from liability in this action. Appellees responded that appellant breached its statutory duty to give them preference in the adoption of Brittany and that, pursuant to *R.C. 2744.03(5) and (6)*, appellant lost any immunity it might have had because it acted in a "wanton or reckless manner" when it placed Brittany with another family.

** On February 17, 1994, a hearing was held on appellant's motion for summary judgment. On February 24, 1994, the trial court denied appellant's motion. The trial court found that, while the actions engaged in by appellant during the course of obtaining pemanent custody of the child were governmental in nature, its subsequent actions were proprietary, thereby removing

governmental immunity protection. The matter proceeded to jury trial on March 9 and 10, 1994, and the following testimony was heard.

Appellee Betty Tingley that appellant placed Brittany in their home in the spring of 1991 when the child was five weeks old. She stated that an attachment was formed between herself and her husband and Brittany and that she and her husband had believed that they would be able to adopt her. Betty stated that when the social worker first brought Brittany to their home she said that this would probably be an easy permanent custody case because the mother was not likely to show up. Betty stated that no one with the Department of Human Services ever promised them that they would be able to adopt Brittany but she assumed that it would be all right. In December 1991, Betty wrote a letter to appellant requesting that they be considered as adoptive parents for Brittany. In January 1992, appellees received a letter from appellant which thanked them for their interest and stated that the departmetn would let them know when a final decision was reached.

Betty testified further that on January 14, 1992, they were told that

if the department received permanent custody of Brittany the child would be moved to another home for adoption. She testified that she and her husband were upset when they learned of the department's decision but said that she did not consult a mental health professional or a physician for advice or help in dealing with her feelings. Betty testified as to her understanding, from appellant's written adoption policy that was in effect when Brittany was placed in her home, that foster parents would be given priority provided that a psychological attachment between the foster parent and child existed and that placement with another family would not be in teh child's best interest. Betty stated that when she and her husband initially became foster parents they wer told that foster parenting was a temporary situation and that they were aware that

families with more than one biological or adotped child would not be considered as candidates for adoption of children aged birth through five years and that at the time Brittany was with them they had both biiological and adopted children living in their home. **3 Appellee Jay Tingley testified as to the attachment he had formed with Brittany and as to his disappointment when he learned that they would not be able to adopt her.

Krista Whitson testified that in December 1991 she was an adoption caseworker for the Williams County Department of Human Services and visited appellees to update their adotion study. She stated that it was then that she learned that they were interested in adopting Brittany.

Deb Willis, a social worker with the Williams County Department of Human Services, testified as to her involvement with Brittany's case. She testified that appellant's stated goal in its case plan for Brittany was reunification with the birth mother.

Appellees rested their case and appellant moved for a directed verdict, which was denied. Gilmer testified that foster parents who wish to adopt

must meet the same eligibility requirements as other adoptive parents. She stated that because appellees were not infertile they would be precluded from adopting a non-special needs child. Gilmer explained that, under the department's policy, a child could be classified as "special needs" after being in the same foster home for at least twelve months but said that Brittany had not been with appellees long enough to meet that criteria.

Bethny Foltz, social service supervisor for the Wyandot County Department of Human Services, testified that she had visited Brittany in her adoptive placement and that the child appeared to have bonded with her parents. She stated that she believed that Brittany's placement was in her best interest.

After deliberation, the jury founod for appellees on the negligence and violation of due process counts and for appellant on the intentional infliction of emothional distress count. Appellant filed a timely appeal.

We will first consider appellant's third assignment of error in which the department asserts that the jury's verdict for appellees on the Section

1983 claim was against the maifest weight of the evidence because appellees failed to prove a violation of their due process rights. Appellees respond that their right to due process was violated by appellant's arbitrary and capricious failure to follow its own policy concerning foster parent adoption. Appellees contend that they were entitled to a preference in their efforts to adopt Brittany.

As stated by the Ohio Supreme Court in *C.E. Morris Co* v. Foley Construction Co. (1978) *54 Ohio St.2d 279*, syllabus:

"Judgment supported by some competent, credible evidence going to all the essential elements of the case will not be reversed by a reviewing court as being against the manifest weight of the evidence."

Upon consideration of all of the evidence that was before the trial court and as summarized above, however, this court cannot find that there was competent, credible evidence presented that appellees' right to due process was violated by appellant's decision to place Brittany in another home for adoptino. Accordingly, appellant's third assignment of error is well-taken.

**4 In its first assignment of error, appellant asserts that the trial court abused its discreetion when it denied its motion for summary judgment. Appellant argues that it was undisputed that 1) appellant is a political subdivision, 2) the operation of a county department of human services is a governmental function, and 3) appellees did not allege that appellant had lost its immunity by acting in bad faith or in a wanton or reckless manner. Appellant asserts that, in light of those undisputed facts, the trial court erred by not ruling that sovereign immunity did apply and that it was entitled to judgment as a matter of law. Appellees restate their argument that, pursuant to *R.C. 2744.01(G)(1)*, the function of placing children for adoption is proprietary, not governmental, and that appellant is therefore liable pursuant to *R.C. 2744.02(B)(2)*.

R.C. 2744.02 provides in pertinent part:

"(A)(1) For the purposes of this chapter, the functions of political subdivisions are hereby classified as governmental functions and proprietary functions. Except as provided in divisions (B) of this section, a

political subdivision is not liable in damages in a civil action for injury, death, or loss to persons or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection wtih a governmental or proprietary function."

While the exceptions specified in division (B) of *section 2744.02* are numerous, we will simply state that the exception allowed by 2744.02(B)(2) and cited by appellees is inapplicable because it bases liability on actions "with respect to <u>proprietary</u> functions of the political subdivisions." [Emphasis added.]

After a thorough examination of the record of proceedings in the trial court and the law, this court finds that appellant's actions as a human services department were at all relevant times governmental in nature, thereby providing the department with immunity from liability as a matter of law as to appellees' state tort claims. As to appellees' due process count under federal law, the record indicates that the trial court properly did not consider the issue of immunity as it would apply to that claim. Immunity, foro purposes of the federal Section 1983 claim, is a question of federal law. *Cooperman v. Univ. Surgical Assoc., Inc. (1987) 32 Ohio St.3d 191*, citing Hampton v. Chicago (C.A. 7, 1973), 484 F.2d 602; see, also, Martinez v. California, (1980), 444 U.S. 277. In light of our finding on appellant's third assignment of error, however, we find that the question of immunity as to the federal claim is rendered moot. Accordingly, appellant's first assignment of error is found well-taken.

**5. In its second assignment of error, appellant a sserts that the trial court erred in denying its motions for directed verdict. In light of our finding as to appellant's first and third assignments of error,

this assignment of error is moot.

On consideration whereof, this court finds that substantial justice was not done the party complaining and the judgment of the Williams County Court of Common Pleas is reversed as to counts one and three. Costs of this appeal are assessed to appellees.

JUDGMENT REVERSED

ABOOD, P.J., and GLASSER and RESNIK, JJ., concur.

IN THE COMMON PLEAS COURT OF WILLIAMS COUNTY, OHIO

Jay Tingley, et al. :

vs. :Case No. 92-CI-011

Williams County Department of Human Services : Judge Barber

JUDGMENT ENTRY

This action came on for trial to a jury on March 9, and 10, 1994. The jury having rendered its verdict,

IT IS ORDERED that plaintiffs Jay and Betty Tingley recover from defendant Williams County Department of Human Services the sum of Fifteen Hundred ($1,500.00) Dollars, as to Count I of their complaint, and Twenty-five Hundred ($2,500.00) Dollars as to Count III of their complaint, for a total of Four Thousand ($4,000.00) Dollars, plus interest at the legal rate, and their costs.

_____

James E. Barber, Judge

Approved:

_____

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Supreme Court, U.S.
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No. 95-600

In The

Supreme Court of the United States

October Term, 1995

JAY T. TINGLEY, *et al.*,

Petitioners,

vs.

WILLIAMS COUNTY DEPARTMENT OF HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Appellate District, Williams County, Ohio

RESPONDENT'S BRIEF IN OPPOSITION

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12 pp

QUESTION FOR REVIEW

Where the Court of Appeals of Williams County, Ohio has thoroughly reviewed the record in this case and has determined that respondent did not act in an arbitrary and capricious manner, should this Court agree to review the case when the asserted errors consist of erroneous factual findings.

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No. 95-600

In The

Supreme Court of the United States

October Term, 1995

JAY T. TINGLEY, *et al.*,

Petitioners,

vs.

WILLIAMS COUNTY DEPARTMENT OF HUMAN SERVICES,

Respondent.

On Petition for Writ of Certiorari to the Sixth Appellate District, Williams County, Ohio

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The respondent, Williams County Department of Human Services, respectfully requests that this Court deny the Petition for Writ of Certiorari submitted by Petitioners, Jay and Betty Tingley.

OPINIONS BELOW

The Sixth District Court of Appeals of Williams County, Ohio, reversed the trial court's denial of a Motion for Summary Judgment in favor of the Tingleys, rejecting Williams County's claims that its function of placing children for adoption is governmental in nature and therefore immune from tort liability. The court's Opinion is published at (1995) 100 Ohio App. 3d 385 and is reproduced in the Appendix to the Tingleys' Petition for Writ of Certiorari. (Appendix, pp. 17-29).

The appellate court also vacated the jury's award of damages to the Tingleys on their 42 U.S.C. § 1983 claim on the basis that there was no "competent credible evidence presented that appellees' right to due process was violated by appellant."

Following issuance of the appellate court decision, the Tingleys sought to invoke the jurisdiction of the Supreme Court of Ohio on the grounds that the case was one of great public or general interest and involved a substantial constitutional question. The Ohio Supreme Court declined to exercise jurisdiction in the case and was of the opinion that no substantial constitutional question was presented. The Ohio Supreme Court's Opinion is published at 72 Ohio St. 3d 1528 (1995) and is likewise reproduced in the Appendix to the Tingleys' Petition for Certiorari. (Appendix, p. 16).

STATEMENT OF THE CASE

This is essentially a negligence action filed by plaintiffs/appellants/petitioners Jay Tingley and Betty Tingley (hereinafter "Tingleys"), against defendant/appellee/respondent Williams County Department of Human Services (hereinafter "WCDHS"). The complaint and amended complaint sought recovery of a foster child who had been placed in the Tingleys' home and

damages arising out of that child's subsequent removal from their home. A 42 U.S.C. § 1983 action was also asserted by the Tingleys, as well as a claim for intentional infliction of emotional distress.

The Tingleys filed their original complaint in this matter in February, 1992. This complaint alleged that the WCDHS was the child placing agency in Williams County, Ohio and that the Tingleys were certified foster parents able to accept placement of foster children in their home. The complaint alleged that a foster child placed by the WCDHS was wrongfully removed from the Tingleys' home even though they had expressed an interest in adopting this foster child. This complaint sought unspecified damages and an injunction restraining the WCDHS from removing the child.

On April 9, 1992, responding to an order for a more definite statement, the Tingleys filed an amended complaint asserting negligence, intentional infliction of emotional distress and deprivation of constitutional rights under color of state law (42 U.S.C. § 1983). This amended complaint again sought return of the child and additionally $500,000 as and for damages allegedly sustained by the Tingleys.

On March 5, 1992, the trial court denied the Tingleys' claims for injunctive relief. The WCDHS filed its answer on May 15, 1992 generally denying the allegations of the amended complaint and asserting twenty-one (21) affirmative defenses. On July 29, 1992, the WCDHS filed its motion to dismiss based on lack of subject matter jurisdiction. This motion was granted by the trial court on September 30, 1992. The Tingleys appealed to the Sixth District Appellate Court in a timely fashion. The Appeals court affirmed the trial court's denial of the Tingleys' request for injunctive relief and remanded their tort claims back to the trial court for further proceedings. (*See Tingley v. Williams County*

Department of Human Services, C.A. Appeal No. 92 WM 000021 (1992)).

On November 17, 1993, counsel for the WCDHS took the depositions of both the Tingleys. WCDHS filed its motion for summary judgment on December 15, 1993. The matter proceeded to oral arguments on WCDHS' motion for summary judgment on February 17, 1994. The trial court denied the WCDHS' summary judgment motion on February 24, 1994.

Thereafter, the matter proceeded to a jury trial on March 9 and 10, 1994. The jury found for the Tingleys on Count I — negligence, and awarded $1,500, and Count III — the § 1983 action, and awarded $2,500. The jury returned a defense verdict on Count II — intentional infliction of emotional distress.

On March 24, 1994, the WCDHS filed motions for directed verdict, judgment notwithstanding the verdict and request for new trial. Same were summarily denied by the trial court on April 8, 1994. Thereafter, the WCDHS filed a timely notice of appeal and the matter came before the Sixth District Appellate Court on November 28, 1994 for oral argument. On January 20, 1995, the Court of Appeals reversed the trial court's decision regarding WCDHS' motion for summary judgment and vacated the jury verdicts and entered summary judgment in favor of the WCDHS.

On March 6, 1995, the Tingleys timely appealed to the Ohio Supreme Court with a Notice of Appeal and Memorandum in Support of Jurisdiction. WCDHS filed its Memorandum Opposing Jurisdiction on March 28, 1995. The Ohio Supreme Court dismissed the Tingleys' appeal on May 31, 1995.

On October 16, 1995, the Tingleys caused their Petition for Writ of Certiorari to be docketed with the Clerk of this Court. The matter now comes before this Court on the issue of the Tingleys' Writ of Certiorari.

REASONS FOR DENYING THE WRIT

The argument advanced by petitioners in support of the Writ of Certiorari in essence boils down to a very simple proposition. Respondent acted arbitrarily and capriciously when it removed the foster child from their home even though they had expressed an interest in adopting the child. Further, petitioners rely on *Rochin v. California*, 342 U.S. 1565, 96 L. Ed. 3d 1983, 72 Sup. Ct. 205 (1952) and argue that the removal of the child by respondent was so "egregious and shocking" that it rises to the level of a denial of their substantive right to due process.

In a futile and misdirected attempt to confuse this Court, petitioners have failed to inform the Court of additional relevant factual testimony that, when considered, clearly supports the denial of the Petition for Writ of Certiorari.

The petitioners continue to argue, albeit erroneously, that respondent's published guidelines provided for a preference to foster parents who wished to adopt a child placed in their care. Actually, the written policy provided that no foster parent could adopt a ward in their charge unless certain published requirements were met. (Trial Transcript, p. 245, lines 12-16, Joint Trial Exhbit #3, p. 4, ¶ III, Eligibility Requirements). Respondent also had an unwritten policy that allowed foster parents to adopt a child in their foster care if the child had been in that home for at least twelve (12) months. (Trial Transcript, p. 276, lines 11-14). After respondent received permanent custody of the child, its written policy was changed to incorporate the above noted unwritten "twelve month" rule. (*See* Plaintiffs' Trial Exhibit #2, p. 5, subheading D, ¶ 1 and p. 6).

Respondent's foster parent program and adoption policy contained a grievance procedure for all participants who felt wronged by actions or inactions of the department. (Trial

Transcript, p. 304, lines 21-22). Petitioners were aware of this grievance procedure yet they made a conscious decision not to avail themselves of the procedure. (Trial Transcript, p. 76, lines 14-24).

The child in question was a "non-special needs" child. The parties stipulated to the State of Ohio's definition of "non-special needs" children. (*See* Stipulation No. 1, Trial Transcript, p. 36, lines 12-25 and p. 37, lines 1-5). Respondent's written adoption policy in effect during the time of the child's placement with petitioners provided that non-special needs children, ages 0-5 years, could *only* be adopted by families that had (1) a proven infertility, and (2) had less than one (1) natural or adopted child already in the home. Additionally, *all* adoption applicants, whether for special needs or non-special needs children, must have had a completed home study assessment on file with the agency. (Joint Trial Exhibit #3, p. 5, subheading IV, ¶s 1-2).

Both petitioners testified at trial that neither was infertile. (Trial Transcript, p. 168, line 13 and p. 190, lines 9-11). They also both testified that at the time, they had four (4) of their own natural and adoptive children living in their home. (Trial Transcript, p. 168, lines 9-25; p. 171, lines 2-8; and p. 190, lines 12-14). There was abundant testimony indicating that a completed home study was *not* on file with the agency at the time of their expressed interest in adopting the child. (Trial Transcript, p. 200, line 25; p. 201, lines 16-18; and p. 251, lines 17-19). Finally, it was undisputed that the child was five weeks old upon placement (Stipulation No. 5, Trial Transcript, p. 37, lines 16-18) and had been in the petitioners' home for less than twelve (12) months. (Stipulation No. 4, Trial Transcript, p. 37, lines 6-10).

The decision not to allow petitioners to adopt the child was based solely upon the fact that petitioners failed to meet the published criteria for adoption by foster parents of a non-special

needs child. There was no arbitrary or capricious conduct on the part of respondent. There was no denial of any substantive due process right. To equate respondent's behavior to that described in *Rochin* is simply misplaced and quite frankly, ludicrous. Indeed, petitioners had a right to be treated fairly and they were.

In *Rochin*, this Court found that the forced removal of evidence from the body cavity of the defendant was reprehensible and obnoxious and could not be used as a basis of Rochin's conviction. Again, the actions of respondent in this case are in no way as reprehensible as the conduct in *Rochin* and, accordingly, respondent's actions cannot be said to "offend those cannons of decency and fairness which express the notions of justice of English-speaking peoples". *Malinski v. New York*, 324 U. S. 401 (1945) at 416-417.

As to petitioners' alternative argument that their situation is similar to a series of cases involving land use and zoning laws, it is submitted that no viable connection can be made between those cases cited by petitioners and the facts of this case. While it is true that *Brady, Littlefield* and *Bateson* involve substantive due process claims, those are all readily and easily distinguishable from the facts of the case *sub judice*.

Brady involved irrational zoning actions that were motivated by political animus. There is absolutely no evidence in the record of this case which even remotely suggests that respondent's actions were politically motivated. That argument has never been raised by petitioners.

Littlefield involved the placing of arbitrary conditions on the granting of a building permit. Again, there is absolutely no evidence in the record to support an argument that the respondent's published guidelines were arbitrary. Petitioners' argument is that the guidelines weren't followed, not that the

guidelines themselves were arbitrary. Again, that argument, too, has never been asserted by petitioners.

Finally, *Bateson* involved the denial of a building permit to an individual who met *all* requirements for the issuance of said permit. In this case, petitioners testified at trial that they did *not* meet all requirements necessary to adopt a non-special needs child.

In each of these cases, it appears there was clear, credible and competent evidence presented that supported the underlying findings of arbitrary and capricious conduct by the various governmental entities involved. In the case at bar, and as noted by the Sixth District Court of Appeals of Williams County, Ohio, the jury's award of damages on the petitioners' 42 U.S.C. § 1983 claim was vacated because of the complete lack of "competent and credible evidence" to support such a claim.

The fact is, respondent never ignored its own published guidelines concerning adoption by foster parents. As noted above, even if a preference was due petitioners, they still did not meet the mandatory criteria for adoption of a non-special needs child.

CONCLUSION

The Williams County Department of Human Services prays that this Court deny the Tingleys' Petition for Writ of Certiorari because the case presents no issue appropriate for the Court's review and because the lower court's holdings were not in error.

Respectfully submitted,

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